Nos. 92-519, 92-593, 92-767

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BOLLEY JOHNSON, *et al.*,
Appellants,
v.
MIGUEL DE GRANDY, *et al.*,
Appellees.

MIGUEL DE GRANDY, *et al.*,
Appellants,
v.
BOLLEY JOHNSON, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellant,
v.
STATE OF FLORIDA, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Florida

BRIEF AMICUS CURIAE OF ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Whether a State-enacted reapportionment plan violates Section 2 of the Voting Rights Act because it does not maximize the electoral opportunities of a minority class in a geographic area of the State, even if the plan provides the minority class with an equal opportunity to participate in the political process and to elect candidates of its choice?

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INTEREST OF AMICUS

This brief is submitted on behalf of the Anti-Defamation League of B'nai B'rith which is a national Jewish organization. The B'nai B'rith was founded in 1842 and estab-

lished its Anti-Defamation League as its educational arm in 1913.

The Anti-Defamation League was organized to advance good will and mutual understanding among Americans of all creeds and races and to combat racial and religious prejudice in the United States. The Anti-Defamation League is vitally interested in protecting the civil rights of all persons, whether they are members of a minority or the majority, and in assuring that each individual receives equal treatment under the law regardless of his or her race, ethnicity, or religion. The Anti-Defamation League takes the position that each person has a constitutional right to be judged on his or her individual merits, rather than as a component part of a particular racial or ethnic group.

Among its many activities directed to these ends, the Anti-Defamation League has in the past filed *amicus* briefs in this Court urging the unconstitutionality or illegality of racially discriminatory laws or practices in cases such as *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Regents of University of California v. Bakke*, 438 U.S. 265 (1978); *United States Steelworkers v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Boston Police Patrolmen's Assn'n, Inc. v. Castro*, 461 U.S. 477 (1983); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); and *Metro Broadcasting, Inc. v. Federal Communications Comm'n*, 497 U.S. 547 (1990). More specifically, in the area of voting rights the Anti-Defamation League has filed *amicus* briefs in *United Jewish Organizations v. Carey*, 430 U.S. 197 (1977); and *Cardona v. Power*, 384 U.S. 672 (1966).

This brief is submitted because of the belief that our system of constitutional liberties is impaired when the law sanctions the use of race or ethnicity in the decision-making processes of governmental activities, except in certain circumstances where it is necessary to correct purposeful discrimination. The Anti-Defamation League regards as unsound the emerging principle under the Voting Rights Act that courts must automatically strive to create the maximum number of racial and ethnic voting districts to the exclusion of any other considerations. If this principle becomes the polestar under the Voting Rights Act, sanction will be given to compulsory electoral success for racial and ethnic minority classes, racial and ethnic divisiveness will intensify, and the process of popular elections on which our government rests will be seriously impeded.

SUMMARY OF THE ARGUMENT

The legitimacy of the Voting Rights Act hinges on the Court's decisions in these consolidated reapportionment cases. In the October 1992 term, the Court embarked on its first excursions into the application of amended section 2 of the Voting Rights Act to the reapportionment of single-member State legislative districts. As challenges involving multi-member districts decline and States reapportion their legislatures following the 1990 census, this Court will increasingly face serious questions regarding how the Voting Rights Act, the Constitution, and the quest for equality among all racial and ethnic classes are to be reconciled in single-member districts. The Court's answers to these questions will necessarily send powerful messages to every member of society regarding the values of our democratic form of government. The enduring principles this Court proclaims matter more than the results it may reach.

In this regard, three important principles are at the forefront in these consolidated cases. First, the Voting Rights Act should not be interpreted to require "separate but equal" districts for minority voters where such districts provide no greater opportunity for effective political participation or political influence. The Voting Rights Act was not intended to relegate racial, ethnic and language minorities to permanent minority status, which is the inevitable result of a fixation on race-based numerical goals. Instead, the Voting Rights Act must be interpreted and applied with the primary goal of rectifying discriminatory voting practices without an obsessive preoccupation with disproportionately magnifying race, ethnicity and language differences over all other factors.

Second, consistent with this principle, a violation of section 2 of the Voting Rights Act is not conclusively demonstrated simply because the three threshold requirements set forth in *Thornburg v. Gingles,* 478 U.S. 30 (1986),[1] are met in the State reapportionment context. The *Gingles* threshold requirements, if established, merely demonstrate that one or more *additional* majority-minority districts are *possible* in a geographic area under consideration. This bare possibility, however, is merely one piece of evidence of an asserted section 2 violation and is a beginning—not an end—to the inquiry. The statutory language of the Voting Rights Act mandates that a violation be demonstrated based on the "totality of the circumstances" such that all relevant factors must be carefully considered and balanced before concluding that a State-enacted reapportionment plan violates section 2. The standard for determining that a violation exists is whether a reapportionment plan results in minorities not having an equal opportunity to participate in the political process and to elect candidates of their choice. The *Gingles* threshold requirements do not, by themselves, answer this question.

[1] The Court determined that in order for a minority class to even assert a section 2 claim in the multimember district context it must prove (1) "it is sufficiently large and geographically compact to constitute a majority in a single member district"; (2) "it is politically cohesive"; and (3) "the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed . . . , usually to defeat the minority's preferred candidate." *Id.* at 50-51 & nn.16-17. In other words, the selection of a multimember electoral system cannot form the basis for a section 2 vote dilution claim if the minority class cannot even form a geographically compact and politically cohesive majority in a single member district.

Finally, the Voting Rights Act should not be interpreted to mandate the imposition of majority-minority (or minority-influence) districts merely because such districts can be computer-generated based solely on racial and ethnic criteria to the exclusion of all other relevant factors. Simply because a majority-minority (or minority-influence) district can be drawn does not mean it must be imposed. As these consolidated cases demonstrate, it is mathematically and topologically possible for voting districts to be drawn such that a racial or ethnic minority can control a majority of districts in a geographic region. A myopic focus on maximizing the number of voting districts based on racial and ethnic criteria leads to this distorted result. No racial or ethnic class is entitled to the maximum possible representation and nothing in the Voting Rights Act remotely supports such a policy.

ARGUMENT

THE VOTING RIGHTS ACT SHOULD NOT BE INTERPRETED TO REQUIRE "SEPARATE BUT EQUAL" VOTING RIGHTS AND DISTRICTS, OR THE MAXIMIZATION OF THE NUMBER OF MAJORITY-MINORITY OR MINORITY-INFLUENCE DISTRICTS

> The Voting Rights Act, once instrumental in overthrowing political apartheid in the South, is becoming a tool in the racial balkanization of American politics.[2]

The Anti-Defamation League supports the laudable concern for protecting the voting rights of all racial, ethnic and language minorities.[3] It supports and encourages efforts to effectively maintain and expand the political influence and voting rights of minorities in the body politic as a whole. The Anti-Defamation League fully supports the integration of all persons of all racial and ethnic backgrounds into contemporary political life, in Florida and throughout the nation. It also supports the principle that no racial or ethnic class is guaranteed either representation proportionate to its makeup in the population or the maximum representation possible.

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[2] *Turner v. State of Ark.*, 784 F. Supp. 553, 561 (E.D. Ark. 1991) (quoting Charles Lane, *New York Newsday*, Sept. 10, 1991, p. 40), *aff'd*, —— U.S. ——, 112 S. Ct. 2296 (1992).

[3] The Anti-Defamation League has considerable disagreement with the practice of grouping racial and ethnic minorities under common labels such as "Hispanic" or "African-American." This racial and ethnic grouping unfairly equates the color of one's skin with a community of interest and creates unjustified stereotypes of culturally diverse minorities. While many racial and ethnic minorities shrare a common history and culture, the color of one's skin alone does not create the community of interest. Instead, a "community's views on crime, employment, education, police brutality, urban sprawl, and urban blight, may be just as indicative of a community of interest as whether the members of the community are predominantly black or white." *Burton v. Sheheen*, 793 F. Supp. 1329, 1357 (D.S.C. 1992).

But the Anti-Defamation League vigorously opposes an interpretation of the Voting Rights Act that results in "separate but equal" voting rights and districts for minorities.[4] The integration ideal can not be realized under a system where minorities achieve political power through political and geographic segregation. Political candidates must be evaluated on their merits—not their race—and it should be possible for minority voters not only to elect candidates of their choice but for minority candidates to be elected in numbers equal to or greater than their proportion in the population.[5] These ideals become unattainable if racial and ethnic minorities become automatically entitled to "separate but equal" districts under the calculus of the Voting Rights Act.[6]

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[4] " 'Separate but equal' and 'separate but better off' have no more place in voting districts than they have in schools, parks, railroad terminals, or any other facility serving the public." *Wright v. Rockefeller*, 376 U.S. 52, 67 (1964) (Douglas, J., dissenting).

[5] For this reason, the Anti-Defamation League views with disfavor the concept that "representatives of choice" or "minority-preferred candidates" must necessarily be of the same racial or ethnic background as the minority class at issue.

[6] The conventional litigation strategy under the Voting Rights Act focuses on the election of minority representatives who will thereby represent minority interests and be spokespersons for political equality. Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1078 (1991). This preoccupation with electoral success "stifles rather than empowers" minority political participation. *Id.* at 1079. It may result in the election of more minority officials, but it ignores "broadening the base of participation and fundamentally reforming the substance of political decisions." *Id.* at 1080. It also "assumes that majority winners rule legitimately, even where such rule leads to permanent minority losers." *Id.* For example:

> [B]lack electoral success theory simply reconfigures winner-take-all electoral opportunities into geographically based, majority-black, single-member districts. Representing a geographically and socially isolated constituency in a racially

Race and ethnicity necessarily play a role in both the liability and remedy stages of a Voting Rights Act claim.[7] A concern for minority voting rights, however, should not automatically result in the imposition of ill-conceived and bizarre-shaped voting districts into which racial, ethnic and language minorities are herded to meet some artificially-imposed numerical goals. Such a reflexive response ignores any consideration of whether existing communities of minority voters, who are currently able to exercise effective political influence, would be disenfranchised by creation of a majority-minority (or minority-influence) district. This type of "remedy" also violates the mandate of the Voting Rights Act that racial and ethnic minorities need not be elected in numbers equal to their proportion in the population.[8] Further, the mechanical imposition of majority-minority (or minority-influence) districts can pervert the Voting Rights Act by allowing minority classes to achieve disproportionately *greater* political strength than is otherwise justified based on the totality of all relevant circumstances.

The Voting Rights Act is a conflict of visions and reflects an untenable compromise between opposing policy

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polarized environment, blacks elected from single-member districts have little control over policy choices made by their white counterparts. Thus, although it ensures more representatives, district-based black electoral success may not necessarily result in more responsive government.

Id. Finally, minority electoral success "romanticizes" minority elected officials as "empowerment role models" and thereby ignores problems of "tokenism" and a false sense of "equality of opportunity." *Id.* at 1079-80.

[7] *See, e.g., United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) (no *per se* rule against using racial factors in districting and apportionment under Fourteenth and Fifteenth Amendments) (White, J., joined by Stevens, J., Brennan, J., and Blackmun, J., with Stewart, J., and Powell, J., concurring in the judgment).

[8] The Voting Rights Act does not establish "a right to have members of the protected class elected in numbers equal to their proportion in the population." 42 U.S.C.A. § 1973(b) (Supp. 1992).

perspectives. For this reason, its interpretation is "not an easy task." *Thornburg v. Gingles*, 478 U.S. 30, 84 (1986), (O'Connor, concurring). Congress enacted section 2 of the Voting Rights Act to help achieve the Fifteenth Amendment's guarantee that no citizen's right to vote is "denied or abridged . . . on account of race, color, or previous condition of servitude." *NAACP v. New York*, 413 U.S. 345, 350 (1973). Much has been written about the history leading to the Act's adoption in 1965 and its amendment in 1982 to implement a "results" rather than "intent" test (including the legislative intent of the 1982 amendments).[9]

Despite the body of scholarship on the Act and its purpose, no consensus has formed on a single standard for determining liability under section 2. Instead, reasonable minds disagree. The Anti-Defamation League believes, however, that the right question to ask is whether " 'as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.' " *Gingles*, 478 at 44 (quoting from U.S. Code Cong. & Admin. News 1982, p. 206). The right question in these consolidated cases, therefore, is whether the State of Florida's reapportionment plans for its Senate and House, Senate Joint Resolution 2-G, result in the defined minority classes having less than an equal opportunity to participate in the political process or elect candidates they support.

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[9] U.S. Code Cong. & Admin. News 1982, pp. 192-221 (legislative history of amendment to section 2); *see generally* BERNARD GROFMAN, LISA HANDLEY, & RICHARD G. NIEMI, MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 38-42 (1992) (review of 1982 amendments and legislative history) (hereafter QUEST FOR VOTING EQUALITY); Jack Quinn, Jonathan B. Sallet, and Donald J. Simon, *Congressional Redistricting in the 1990s: The Impact of the 1982 Amendments to the Voting Rights Act*, 1 GEO. MASON CIV. RIGHTS L.J. 207 (1990) (discussion of case law and issues arising since the 1982 amendments).

This ultimate question raises a host of intermediate questions. The first is whether proof of the *Gingles* threshold requirements conclusively establishes liability under section 2 in the State reapportionment context. A related question is what standard or measure of minority voting strength is relevant in determining whether a challenged reapportionment plan denies a minority class equal opportunities to participate in the political process and elect candidates of its choice. Another is whether the maximum number of majority-minority (or minority-influence) district must automatically be imposed as a remedy for a section 2 violation.

The answers to these methodological questions are complex but certain principles are discernable. First, in determining whether a section 2 violation has occurred *all* relevant factors must be assessed—not just the three *Gingles* threshold factors. Second, the standard by which to gauge a State's reapportionment plan is not a hypothetical plan that maximizes the number of majority-minority (or minority influence) districts or a plan that provides proportional representation. Instead, the standard is set forth in the Voting Rights Act and *Gingles*: whether based on the totality of the circumstances the State's plan would cause a minority class to have less than an equal opportunity to participate in the political process or elect candidates they support. Finally, the Voting Rights Act does not sanction the maximization of the number of majority-minority (or minority-influence) districts. Federal courts should be extremely hesitant to impose additional majority-minority (or minority-influence) districts where a minority class already has a meaningful opportunity to participate in the political process and elect representatives sensitive to its concerns.

A. Proof Of The *Gingles* Threshold Requirements Does Not Conclusively Establish A Section 2 Violation

A fundamental question is whether a violation of section 2 of the Voting Rights Act is conclusively demonstrated simply because the three threshold requirements of *Thornburg v. Gingles* are met in the reapportionment context.[10] The Anti-Defamation League respectfully suggests that it is not.

First, and most importantly, the statutory language of section 2 requires that a "totality of the circumstances" test be used to determine whether a violation has occurred.

> A violation . . . is established if, *based on the totality of the circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C.A. § 1973 (Supp. 1992) (emphasis added). It cannot be seriously argued that the three-part *Gingles* test encompasses the entire range of factors that Congress intended under a "totality of the circumstances" approach. For this reason alone, the *Gingles* prerequisites are insufficient to establish a violation.[11]

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[10] The Eleventh Circuit's equally divided opinion in *Solomon v. Liberty County, Fla.*, 899 F.2d 1012 (11th Cir. 1990) (en banc), demonstrates the polar positions on this issue. The court split on whether the *Gingles* threshold criteria, if proven, conclusively demonstrate a violation. Five judges supported the position that satisfying the three *Gingles* criteria under the circumstances presented was sufficient to establish a section 2 violation. *Id.* at 1021 (plaintiffs "met all three *Gingles* requirement. This is all the Supreme Court requires, and I may require no more."). Five other judges rejected a "mechanical interpretation" of section 2 and contended that proof of the *Gingles* requirements does not invariably establish a violation. *Id.* at 1035.

[11] *See Gingles*, 478 U.S. at 46 ("Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process."); *Voinovich v. Quilter*, —— U.S

Second, the *Gingles* threshold criteria are a methodology for analyzing whether a plaintiff minority class has a viable—not necessarily a successful—section 2 claim. The *Gingles* test is an initial hurdle or precondition, not a finding of ultimate liability. The question in *Gingles* was whether the minority plaintiffs' "ability *to elect* the representatives of their choice was impaired by the selection of a multimember electoral structure." 478 U.S. at 46 n.12 (emphasis in original). Unless minority voters possess the potential to elect representatives in the absence of the challenged multi-member structure, they can not claim to have been injured by the State's use of multi-member districts. *Id.* at 50 n.17.

The argument is similar in the reapportionment context. A minority class cannot claim that a reapportionment plan violates section 2 unless, as a precondition, the minority class can demonstrate that the plan has the *potential* to be discriminatory because it submerges or fragments a geographically compact and politically cohesive minority class that could otherwise form a majority in a single member district.[12] Proof of the three thresh-

old requirements merely demonstrates that a State could have drawn one or more additional majority-minority districts in a particular geographic region. This inquiry merely answers the question whether a State's plan *could* be violative of section 2. The *Gingles* threshold factors, if proven, begin consideration of the "totality of the circumstances"—they do not end the inquiry. For this reason, a plaintiff's burden is not met by using the *Gingles* threshold requirements as an evidentiary shortcut to ultimate liability.[13]

Finally, the *Gingles* preconditions, by themselves, create perverse incentives that detract from the integration ideal. The requirement of a "sufficiently large and geographically compact" minority makes racial segregation a prerequisite for a voting rights violation.[14] The requirement of racially polarized voting lessens the prospects of long term cross-racial political unity. The concept of a "minority-preferred candidate" adds legitimacy to the stereotype that only a minority can represent minority interests and that minorities are preoccupied with race and ethnicity and have little concern for other pressing social, economic and political issues.[15] Simply stated, the *Gingles* test institutionalizes an entitlement to distinct racial and

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——, 113 S. Ct. 1149, 1157 (1993) ("plaintiffs can prevail on a dilution claim only if they show that, under the totality of the circumstances, the State's apportionment scheme has the effect of diminishing or abridging the voting strength of the protected class.").

[12] The three *Gingles* prerequisites are relevant threshold requirements in establishing a vote-fragmentation claim with respect to single member districts. *Growe v. Emison*, —— U.S. ——, 113 S. Ct. 1075 (1993).

> The "geographically compact majority" and "minority political cohesion" showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district[.] And the "minority political cohesion" and "majority bloc voting" showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population[.] Unless these points are established, there neither has been a wrong nor can be a remedy.

113 S. Ct. at 1084 (citations and footnote omitted).

[13] The burden of proving a violation of section 2 is "squarely on the plaintiff's shoulders." *Voinovich v. Quilter*, —— U.S. ——, 113 S. Ct. 1149, 1156 (1993).

[14] *See* Dona R. Carstarphen, *The Single Transferable Vote: Achieving the Goals of Section 2 Without Sacrificing the Integration Ideal*, 9 YALE L. & POL'Y REV. 405, 407 (1991).

[15] The concept has resulted in considerable disagreement regarding whether the race of a "minority-preferred" candidate is a proper consideration under section 2 analysis. *See* Sushma Soni, *Defining the Minority-Preferred Candidate Under Section 2*, 99 YALE L.J. 1651 (1990) (analyzing various approaches and suggesting that the race of minority-preferred candidates is properly considered as a factor in determining a section 2 violation).

ethnic districts and perpetuates the notion that minorities have "separate but equal" voting rights.[16]

In summary, determining whether a State's reapportionment plan violates section 2 of the Voting Rights Act necessitates a probing and thoughtful consideration of numerous historical, social, economic, legal and political factors. The Voting Rights Act recognizes the complexity of this inquiry and requires that an asserted violation be based on the "totality of the circumstances." The three *Gingles* threshold requirements, however, do not encompass the "totality of circumstances" and thereby cannot conclusively establish liability. Instead, they merely demonstrate that plaintiffs present a *viable* section 2 claim.

B. The Proper Standard For A Violation Of Section 2 Is Whether A Challenged Reapportionment Plan Denies A Minority Class Equal Opportunities To Participate In The Political Process And Elect Candidates Of Its Choice

The next step in determining whether a State's reapportionment plan violates section 2 requires a comparison of the State's plan against some standard of "undiluted" or "unfragmented" minority voting strength. Various standards of minority voting strength exist such as hypothetical plans that provide either proportionate representation or maximum feasible voting strength.[17]

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[16] In addition, litigation since *Gingles* has unnecessarily focused on minority electoral success as the singular measure of minority political achievement. The "opportunity to elect candidates, while important, is not the sole or even the most crucial element of political efficacy. Important political goals such as expression of preferences and alteration of substantive policies are accomplished not simply by pulling a lever, but by engaging in activities such as discussion, lobbying, and coalition-building with others." Kathryn Abrams, *"Raising Politics Up": Political Participation and Section 2 of the Voting Rights Act*. 63 N.Y.U. LAW REV. 449, 452 (1988).

[17] *See Gingles*, 478 U.S. at 88-99 (discussion of various measures of "undiluted" voting strength including "maximum feasible voting

The choice of standards is important because, to a great extent, the standard for determining liability becomes the standard for relief. For instance, if a State's plan is compared with, and falls short of, a standard that provides for maximum possible minority voting strength, a district court may become more inclined to find a section 2 violation and impose the standard used as the appropriate remedy.

The problem is that once the *Gingles* criteria are met, it becomes tempting for district courts to place inordinate or conclusive weight on them in determining section 2 liability. This approach unjustifiably reduces a probing inquiry into all relevant factors into an examination of whether another majority-minority district could be drawn. This seriously misinterprets *Gingles* and the Voting Rights Act. A methodology that fixates on providing maximum possible minority representation or mathematically equivalent representation is flawed because the Voting Rights Act does not guarantee any racial or ethnic class either maximum feasible voting strength or proportionate representation.

Instead, the appropriate standard is whether a State's challenged reapportionment plan provides an equal opportunity to all racial and ethnic classes to participate in the political process and elect candidates of their choice.[18] In applying this standard, it may be permissible for litigants to compare a State's plan with hypothetical plans that provide for proportionate or maximum feasible voting strength. States should be permitted to defend their plans against such standards. But the legal standard must ultimately be whether based on the totality of the cir-

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strength" stnadard) (O'Connor, J., concurring in judgment); *see also*, QUEST FOR VOTING EQUALITY, *supra* note 9, at 124-28 (discussion of standards other than single member districts such as single-nontransferable voting systems, semiproportional systems, power sharing devices, etc.).

[18] 42 U.S.C.A. § 1978 (Supp. 1992); *Gingles*, 478 U.S. at 44.

cumstances a State's plan provides racial and ethnic minority classes with equal opportunities to participate in the political process and elect candidates of their choice. A State's plan may provide these opportunities even if the *Gingles* threshold criteria are established and additional majority-minority (or minority-influence) districts are possible.

C. The Voting Rights Act Does Not Mandate the Creation Of The Maximum Number Of Majority-Minority Or Minority-Influence Districts

Undue reliance on the *Gingles* threshold criteria can result in a misguided liability and remedial standard: the maximization of the number of minority-controlled districts. The Voting Rights Act, however, does not mandate the imposition of majority-minority (or minority-influence) districts merely because such districts can be computer-generated based solely on racial and ethnic criteria without due consideration of other relevant factors. The fact an additional majority-minority (or minority-influence) district can be drawn does not mean it should be imposed, particularly where a minority class has meaningful representation in its geographic area. The holding in *Gingles* should not result "in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups that are large enough to constitute majorities if concentrated within one or more single-member districts." *Gingles*, 478 U.S. at 85 (O'Connor, J., concurring).

Similarly, there is no right to the maximum feasible representation in favor of racial and ethnic minority classes. It is mathematically and topologically possible for voting districts to be drawn, as these consolidated cases demonstrate, such that a racial or ethnic minority can have effective control of more than a majority of districts. A myopic focus on maximizing the number of voting districts of geographically and politically cohesive

racial and ethnic minorities leads to this distorted result. Nothing in the Voting Rights Act remotely supports such a policy.

A simple mathematical example demonstrates how the maximization principle leads to unwarranted results.[19] Suppose state X has a population of 100,000 and 10 Senate districts (10,000 persons per district). State X's population includes 40,000 persons comprising a single "politically cohesive" minority class. State X enacts a Senate plan providing for ten districts, four of which are geographically compact "safe" minority districts as set forth in Table 1.[20]

TABLE 1

STATE X'S SENATE PLAN #1

District	Non-Minority	Minority
1	3,500	6,500*
2	3,500	6,500*
3	3,500	6,500*
4	3,500	6,500*
5	7,500*	2,500
6	7,500*	2,500
7	7,500*	2,500
8	7,500*	2,500
9	7,500*	2,500
10	8,500*	1,500
TOTAL	60,000	40,000

[19] The examples presented are structured around a fictitious State X, but could just as easily represent a limited geographic region within State X. The principles the examples illustrate, therefore, can be applied to portions of a reapportionment plan limited to a particular geographic area or region of a State.

[20] For purposes of this example, a "safe" minority district requires that 65% of its voting age population be from the minority class. *E.g.*, Districts 1-4 in Table 4. For an overview of the 65 percent rule, *see*, QUEST FOR VOTING EQUALITY, *supra* note 9, at 120-121.

State X's Senate plan provides a meaningful opportunity for the minority class to elect candidates of its choice in four districts, and does not disenfranchise the minority class in the remaining six districts. Instead, the minority class has some degree of influence in the remaining districts, such that candidates cannot entirely ignore the minority class' interests.

An alternative plan that maximizes the number of "safe" majority-minority districts is set forth in Table 2.

TABLE 2

SENATE PLAN #2

District	Non-Minority	Minority
1	3,333	6,667*
2	3,333	6,667*
3	3,333	6,667*
4	3,333	6,667*
5	3,333	6,667*
6	3,335	6,665*
7	10,000*	0
8	10,000*	0
9	10,000*	0
10	10,000*	0
TOTAL	60,000	40,000

This alternative plan provides the minority class with the opportunity of electing candidates of its choice in six districts, thereby having a super-majority of representatives in State X's Senate despite constituting a minority of the population. This plan diminishes the Non-Minority class' voting rights and entirely disenfranchises minority influence in four districts. Needless to say, such a plan would more likely paralyze rather than promote the progress of racial or ethnic harmony in State X.

The type of plan depicted in Table 2, however, results from the unidimensional focus on maximizing the number of racial or ethnic majority-minority districts. The geographically compact requirement of *Gingles*, of course, may somewhat reduce the number of possible majority-minority districts in State X.[21] Nonetheless, the point remains that the maximaztion principle can, and will in many instances, result in disproportionately greater representation than is otherwise justified.

This maximization principle has an unspoken corollary: the minimization of the majority class' voting opportunities. The goal of maximizing the number of majority-minority districts reflects a willingness to minimize the number of majority-majority districts. In Florida, reapportionment is a zero sum game. The number of districts is constitutionally capped at the current numbers of 40 and 120 for Senate and House districts, respectively. Art. III, § 16(a), FLA. CONST. Each additional district crafted for a minority class is one less district for another minority class or the non-minority class. An increase in the number of majority-minority districts, of course, is justified if necessary to rectify a State's failure to provide the minority class with equal opportunities to participate in the political process and elect candidates of its choice. But no sound interpretation of the Voting Rights Act supports the automatic maximization or minimization of any race or ethnic class' voting opportunities.

Maximization neglects other important values. Districts that attempt to whittle out majority-minority and minority-influence districts often merely "bleach" minority voters from surrounding districts in which they have exercised some influence and compartmentalize them into a "separate but equal" district. Maximization can lead to the creation of bizarre-shaped districts linking enclaves of mi-

[21] The compactness requirement, however, has become of relatively inconsequential importance in drawing minority-controlled districts. *See* QUEST FOR VOTING EQUALITY, *supra* note 9, at 64-65 (noting "the extraordinary ingenuity of mapmakers, aided by computers and geographically-based census files, has already produced new districts for the 1990s that surpass almost any earlier district in degree of contortion.").

nority voters from distant communities that are so geographically spread out that there is no sense of community or commonality.[22] These districts may be unmanageable from the standpoint of constituent services.[23] Such districts can become so convoluted that members and representatives can scarcely tell who actually lives in their respective districts.[24]

Maximization also leads to the gerrymandering of diverse geographic and political interests into districts without a commonality of interest. Maximization may merely move minority voters to districts where they can be packed together to increase their numbers, and presumably their influence, while reducing their overall influence. Simply because a majority-minority or minority-influence district can be theoretically drawn, often it will not satisfy the requirement that the district be geographically compact.[25] For this reason, minority populations should not be haphazardly joined together as the automatic, reflexive, or even preferred response to achieving the desirable mandate of the Voting Rights Act.

Further, as the racial and ethnic composition of a State becomes larger and more diverse the maximization principle crumbles under its own weight.[26] Suppose that State

[22] *See Burton v. Sheheen*, 793 F. Supp. 1329, 1356 (D.S.C. 1992).

[23] *Id.*

[24] *Id.* As District Judge Roger Vinson stated regarding Florida's Congressional reapportionment plan, "[p]erhaps most importantly, I do not believe that these districts will make sense among the public. They appear to be something created by Governor Elbridge Gerry." *De Grandy v. Wetherell*, 794 F. Supp. 1076, 1092 (N.D. Fla. 1992) (Vinson, J., concurring).

[25] "Without some objective geographical compactness standard to evaluate districts, the potential for future abuse in crafting district boundaries is virtually unlimited." *Id.* (Vinson, J., concurring).

[26] Other significant issues also arise as a population becomes more racially and ethnically diverse. *See* Rick G. Strange, *Application of the Voting Act to Communities Containing Two or More Minority Groups—When Is the Whole Greater Than the Sum of the Parts?*, 20 TEX. TECH L. REV. 95 (1989) (discussion of various issues such as whether distinct racial and ethnic minority groups can be aggregated for purposes of *Gingles* threshold requirements).

X's population is comprised of *two* politically cohesive minority classes of 40,000 (Minority 1) and 20,000 (Minority 2), respectively. Also, State X's population is dispersed such that no members of Minorities 1 and 2 are located in a region of the State that has a Non-Minority population of 20,000 thereby requiring the establishment of two Non-Minority districts. Two alternative and mutually exclusive plans that maximize the number of "safe" majority-minority districts for Minorities 1 and 2 are set forth in Table 3.[27]

TABLE 3

ALTERNATIVE SENATE PLANS #3/#4

District	Non-Minority Plan #3/#4	Minority 1 Plan #3/#4	Minority 2 Plan #3/#4
1	2,000 / 3,333	8,000*/ 6,667*	0/0
2	2,000 / 3,333	8,000*/ 6,667*	0/0
3	2,000 / 3,333	8,000*/ 6,667*	0/0
4	2,000 / 3,333	8,000*/ 6,667*	0/0
5	2,000 / 3,333	8,000*/ 6,667*	0/0
6	3,334 / 3,335	0 / 6,665*	6,666*/0
7	3,333 / 0	0 /0	6,667*/10,000*
8	3,333 / 0	0 /0	6,667*/10,000*
9	10,000*/10,000*	0 /0	0 /0
10	10,000*/10,000*	0 /0	0 /0
TOTAL	40,000 /40,000	40,000 /40,000	20,000 /20,000
# of Safe Districts	2/2	5/6*	3*/2

Under these circumstances, a complex and irreconcilable situation results if Minority 1 claims entitlement to six "safe" seats (under Plan 4) and Minority 2 claims entitlement to three "safe" seats (under Plan 3). The total of

[27] For purposes of this example, a "safe" district for Minority 1 or Minority 2 requires that 65% of its voting age population be from the particular minority class.

nine seats claimed exceeds the eight available.[28] The maximization principle loses its virtue at this point because no principled basis can explain why Minority 1 or Minority 2 should be entitled to the additional district to add to their already supra-proportional representation in State X.[29] The legitimacy of the maximization principle quickly deteriorates as the number of racial and ethnic classes increases, each demanding their own districts from the limited number available.

Finally, an important question is whether racial and ethnic proportionality on a statewide or regional basis are proper considerations in determining a violation of, or remedy under, section 2. For example, suppose a minority class constitutes 10% of a State's voting age population, half of which is dispersed throughout the State such that the *Gingles* threshold criteria cannot be met in those areas. The other half is concentrated primarily in a densely populated urban area of the State where it constitutes 50% of the voting age population and can form a geographically compact and politically cohesive majority in more than 50% of the area's legislative districts.

Under these circumstances, must the State attempt to provide the minority class with control of 10% of legislative districts on a statewide basis, despite the minority's inability to meet the *Gingles* threshold requirements

[28] This is the type of conflict of minority interests that the District Court confronted in reviewing the Senate and House Plans in the Dade County area.

[29] Complicating matters further, Minority 1 could be deemed the "majority" class in the remainder of State X because it has 40,000 of the 80,000 population to be apportioned among the eight districts. The "Non-Minority" class could be deemed a minority class, along with Minority 2, because each have only 20,000 of the 80,000 population to be apportioned and each could claim entitlement to three "safe" seats. The maximization principle, therefore, muddles rather than enlightens the determination of which of the racial classes are entitled to the eight seats.

throughout most of the State? Does a State plan that provides for proportional representation in the urban area, but not statewide, violate section 2? Does the minority class have a claim to additional, super-majority districts in the urban area in order to achieve statewide proportionality? The answers to these questions are self-evident.

It is axiomatic that there is no right to racially or ethnically proportional representation on either a statewide or regional basis. The text of the Voting Rights Act clearly provides there is no "right to have members of the protected class elected in numbers equal to their proportion in the population." 42 U.S.C.A. § 1973(b) (Supp. 1992). It will invariably be the case that racial and ethnic minorities cannot establish the *Gingles* threshold criteria throughout many parts of a State because they are not sufficiently numerous to constitute a majority in a geographically compact district. This fact does not grant to members of the minority class in another part of the State, where the *Gingles* threshold criteria can be met, a claim to disproportionately greater representation to achieve statewide racial balance.

CONCLUSION

> When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.[30]

The Anti-Defamation League recognizes the need to remedy purposeful discrimination, and supports the principles that motivated the initial enactment of the

[30] *Wright v. Rockefeller*, 376 U.S. 52, 67 (1964) (Douglas, J., dissenting).

Voting Rights Act. The Anti-Defamation League, however, strongly opposes the notion that each racial and ethnic group in America has a right to electoral success in a prescribed number of seats in government. Such a result is contrary to the fundamental democratic principles upon which our Constitution and the Voting Rights Act are founded. Guaranteeing proportional or maximum minority electoral success is misguided, and is a certain step down the path to racial and ethnic political separatism. Discrimination and deliberate denial of voting opportunity are evils that justify a remedy. But political segregation for racial and ethnic minorities cannot conquer these evils in the long term. True racial equality cannot be realized in "separate but equal" representative systems. The Anti-Defamation League therefore respectfully asks that this Court interpret the Voting Rights Act in these consolidated cases in accordance with the principle and purpose for which it was enacted; equality of political opportunity.

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